IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRIS THOMAS GOMEZ,
Appellant.

No. 2 CA-CR 2018-0052
Filed August 8, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20163385001
The Honorable Bryan B. Chambers, Judge

REVERSED AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Richard C. Bock, Tucson

and

Harley Kurlander, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring concurred and Judge Brearcliffe dissented.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Chris Gomez was convicted of sexual assault, and the trial court sentenced him to 5.75 years' imprisonment. This appeal requires us to consider the admissibility of DNA evidence—specifically, an "inconclusive" DNA profile that included two alleles also contained in Gomez's profile. For the reasons stated below, we reverse Gomez's conviction and remand for a new trial.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Gomez's conviction. *See State v. Miles*, 211 Ariz. 475, ¶ 2 (App. 2005). Early one morning in July 2016, J.B. was working as an Uber driver when she received a notification that someone—later identified as Gomez—had requested a ride. When J.B. picked him up, Gomez sat in the front passenger seat of her van and directed her to an apartment complex on the northeast side of Tucson, approximately forty minutes away.

¶3 According to J.B., once they arrived at the complex and she had parked, she tried to "end the trip" using the Uber software application on her cell phone, but Gomez grabbed her wrist. Gomez then used one arm to restrain her and the other to pull her closer to him. Gomez "push[ed J.B.'s] bra and . . . dress down," kissing her face, neck, chest, and breast. J.B. repeatedly told him to stop and tried scratching him. According to J.B., Gomez pulled up her dress and "put his fingers inside . . . [her] vagina." While Gomez tried to remove his pants, J.B. managed to push him away and get out of the van. J.B. then demanded that Gomez get out, and, after initially trying to coax her back into the van, he eventually complied. As Gomez walked toward her, J.B. "immediately got back in the van, closed the door and hit the lock button." Gomez started knocking on the window, telling J.B. that he "wanted to talk about what just happened," but she drove off.

¶4 J.B. called her husband, R.R., and told him what had happened.[1] He told her to go somewhere safe, and she drove to a nearby gas station and called 9-1-1. After J.B. spoke with the responding officers, she went to a nearby hospital, where nurses performed a sexual-assault examination and collected DNA samples from her face, neck, chest, breasts, fingernails, vagina, and external genital areas.

¶5 Officers received information from Uber identifying Gomez as the individual to whom J.B. had given a ride that night. J.B. also received the following message from Gomez through the Uber application: "Sorry about all that. Way out of line." However, in an initial interview with officers, Gomez reported that "nothing happened" and that he "never touched" J.B. A grand jury indicted Gomez for one count of sexual assault of J.B. "by placing his finger(s) in her vagina."

¶6 A DNA analyst matched the DNA taken from J.B.'s face, neck, chest, and breasts to Gomez. However, the analyst could neither include nor exclude Gomez as a contributor of the DNA found under J.B.'s fingernails. As for the vaginal and external genital samples, the analyst performed a Y-DNA test to exclude J.B.'s DNA,[2] and those swabs showed the "full profile" for R.R.[3] She excluded Gomez as a contributor to the vaginal swabs. On the external genital swabs, however, the analyst found "two additional male DNA markers or . . . [a]lleles," that were contained in Gomez's profile. She explained that because there were only "two markers" and "the rest of that minor DNA profile" was absent, she could draw no conclusions about whether it matched any specific person's DNA profile. The minor Y-DNA profile on the external genital swabs was therefore "inconclusive."

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[1]J.B. and R.R. are not legally married; however, they have three children together and refer to each other as husband and wife.

[2]The analyst used a technique called Y-STR (short tandem repeat), which involved her "looking at repeating sections, just on the Y chromosome." The Y chromosome is passed from father to son; females do not have a Y chromosome.

[3]After an initial DNA report was completed in November 2016, R.R. provided a buccal swab for additional testing because J.B. had informed the nurse who performed the sexual-assault examination that she and R.R. had sex earlier in the night before she gave Gomez a ride.

¶7 Before trial, Gomez filed a motion in limine to preclude "[a]ny testimony of a minor Y-DNA profile obtained from the external genital swabs." He argued the evidence was not relevant because "there is not sufficient facts or data" to "make a scientific conclusion" or "run statistics." He therefore reasoned the evidence was inadmissible under Rules 401 and 702, Ariz. R. Evid. The state responded that the analyst "can't say, using statistical analysis, that this defendant is the one who is responsible for leaving that DNA there," but the state nevertheless argued "it is absolutely relevant" because "this is her analysis, this is how [the analyst is] able to run this comparison, this is how she performs her work." In reply, Gomez maintained the evidence "runs a gigantic risk of confusing the jury." The trial court ruled the evidence admissible but precluded the state from arguing that "this particular result of the DNA test shows that [Gomez's] DNA was there." In part, the court explained, "If we leave out the results here, we'll get a jury question." It reasoned that "the absence of a result . . . may lead to more speculation than just telling [the jury] it's inconclusive." The court also provided that if the state "infer[s] anything more than that, there might be a curative instruction."

¶8 During trial, the prosecutor asked the DNA analyst about the external genital swabs, and she confirmed that the major Y-DNA profile matched R.R. However, the analyst also testified she had identified a minor Y-DNA profile, explaining that, because she only found two DNA markers, there was insufficient information to make any sort of comparison. She thus stated that the minor Y-DNA profile was "inconclusive" and could not be matched to any specific DNA profile without additional testing. When the prosecutor asked about the minor alleles, defense counsel requested a sidebar conference. Defense counsel argued, "This is the exact same inference that the Court said could not be drawn. And this line of questioning is highlighting this portion of the report and asking the jury to draw that inference." In response, the prosecutor explained, "She's not going to be able to say it's him. I'm not going to argue it's him. But the jury can see the information. These are the facts." The court overruled the objection.

¶9 The analyst then testified that the two alleles found in the minor Y-DNA profile were contained in Gomez's profile but that she could not determine "this DNA is . . . Gomez's" because with "only two types in the minor DNA profile" there is not enough information for "any kind of comparison." She stated, "[T]he minor DNA profile and the external genital swab is inconclusive."

¶10 When Gomez testified later that day, he acknowledged that he had contacted Uber to request a ride and that J.B. was his driver. Gomez explained that, after J.B. had parked her van at the apartment complex, they had continued talking, and, because he thought J.B. was "interested" in him, he leaned over and started kissing her. According to Gomez, J.B. "[r]eciprocat[ed]"; he continued to kiss her neck, chest, and breasts, and she "[e]njoyed it." Gomez testified that when he tried to kiss J.B. on the lips again, she pulled away, explaining she was in a relationship. He stated that he stopped, apologized, and left. Gomez denied "put[ting his] fingers inside of her vagina" or doing anything that was not consensual.

¶11 During closing arguments, the prosecutor encouraged the jury to review the DNA analyst's reports, explaining that they should "read carefully what her results say because you need to make sure you're picking up on the major and the minor." She recounted the test results of the different DNA samples, and, specifically with regard to the external genital samples, she stated those swabs had "the exact same Y male profile" as R.R. but "there [were] two outliers" that belonged to another male contributor. She continued:

> Gomez is excluded as the major contributor. The minor Y is inconclusive for comparison purposes. There is not enough for her to say and there never will be.
>
> . . . .
>
> What does inconclusive mean? What did she tell us? You can't say anything about it. You can't say whether someone's included or excluded. There's simply not enough.
>
> [Defense counsel asked the analyst], so it could be anyone in the world and we just don't know? She said, yeah, it's true. But when we look at the evidence in this case, who can tell us who the other male was?

¶12 At that point, Gomez requested a mistrial. The prosecutor responded, "What I was about to say is the one person who can tell us who the other male was is [J.B.] because she is the one who says there is another male that touched me." The prosecutor reasoned that, because "[t]here's another male present on . . . her genital[] swabs[, t]hat's an inference from

the evidence that I get to draw." The trial court denied Gomez's motion for a mistrial.

¶13 The prosecutor resumed her argument:

> Who did [J.B.] tell you was forcing his fingers in her vagina? This defendant. That narrows down the it could be anyone in the world to the only other possibility that it could be.
>
> It's not the DNA evidence because that's inconclusive. But you don't have to take things in a vacuum when you decide this case. You decide this case based on the totality of the circumstances, absolutely everything that you've heard in this courtroom.

In rebuttal, the prosecutor further stated, "The DNA evidence helps corroborate the things that [J.B.] said happened to her from the very beginning, not months later."

¶14 A jury convicted Gomez as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

"Inconclusive" DNA Evidence

¶15 Gomez raises several arguments related to the external genital swabs and the "inconclusive" minor Y-DNA profile.[4] He contends the trial court erred by denying his motion in limine because "testimony of the 'inconclusive' external genital swab results was not relevant and unfairly prejudicial." He further maintains the court erred by overruling his objection to the analyst's testimony that "two alleles found in the minor profile were within . . . Gomez's profile" because the testimony was irrelevant and "the necessary link in improperly arguing the corroborative

[4]Gomez's arguments relate both to the admissibility of this evidence and the state's closing arguments based thereon. Because we find error requiring retrial with respect to the admissibility of this evidence, we only separately address Gomez's arguments concerning the closing arguments indirectly as part of our harmless-error analysis below.

effect of the inconclusive DNA." We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Alvarez*, 228 Ariz. 579, ¶ 3 (App. 2012); *see also State v. Gamez*, 227 Ariz. 445, ¶ 25 (App. 2011) (motion in limine). An abuse of discretion occurs when the court's reasoning is clearly untenable, is legally incorrect, or amounts to a denial of justice. *State v. Gomez*, 211 Ariz. 111, ¶ 12 (App. 2005).

¶16 As he did below, Gomez relies principally on Rules 401 and 702 to argue that evidence of the "inconclusive" minor Y-DNA profile was irrelevant and, therefore, inadmissible. He asserts the "'inconclusive' DNA without statistical information was not relevant for identification since it couldn't match anyone" and, even assuming the evidence had some "minimal value [in] explaining what [the analyst] had done," that value "was substantially outweighed by the . . . risk of 'unfair prejudice' in misleading the jurors," under Rule 403, Ariz. R. Evid.[5]

¶17 Generally, to be admissible, evidence must be relevant. Ariz. R. Evid. 402. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401; *see State ex rel. Thomas v. Duncan*, 216 Ariz. 260, ¶ 13 (App. 2007). However, even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." Ariz. R. Evid. 403; *see State v. Hardy*, 230 Ariz. 281, ¶ 40 (2012).

¶18 The admissibility of expert testimony is additionally governed by Rule 702. That rule allows an expert witness to testify, if among other things, "the testimony is based on sufficient facts or data." Under Rule 702, the evidence must be "helpful" to the trier of fact. Ariz. R. Evid. 702 cmt. to 2012 amend. In other words, the evidence must be "sufficiently tied to the facts of the case" and "aid the jury in resolving a factual dispute." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591

[5]As Gomez recognizes, he did not expressly invoke Rule 403 below. However, he did argue that the evidence would confuse the jury, and the trial court appeared to consider Rule 403, noting, "I don't believe the defendant will be prejudiced by an inconclusive response." Gomez therefore preserved the issue for appeal. *See State v. Paris-Sheldon*, 214 Ariz. 500, n.7 (App. 2007) (defendant's objections gave trial court opportunity to rule on issue and correct possible errors and, thus, were sufficient to preserve issue for appeal).

(1993); *accord State v. Salazar-Mercado*, 234 Ariz. 590, n.1 (2014). This requirement is "another aspect of relevancy." *Daubert*, 509 U.S. at 591.

¶19 DNA evidence is generally admissible because it tends to establish that it is more or less probable that the defendant committed the crime charged. *See* Ariz. R. Evid. 401; *see also State v. Forde*, 233 Ariz. 543, ¶ 64 (2014) (DNA found on ring relevant as increasing probability defendant handled item and was involved in home invasion). When an expert establishes a DNA match using a method accepted as admissible, he or she "may testify and express his or her opinions in several ways that effectively communicate his or her findings." *State v. Hummert*, 188 Ariz. 119, 124 (1997); *see State v. Boles*, 188 Ariz. 129, 132 (1997) ("[E]vidence of a match, even without statistical interpretations of its significance, is admissible, and expert opinion based on personal experience on the likelihood of a random match is admissible.").

¶20 We find *State v. Escalante-Orozco* instructive. 241 Ariz. 254 (2017), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135 (2018). There, the defendant was convicted of first-degree murder, sexual assault, and first-degree burglary. *Id.* ¶ 1. On the victim's nightshirt, a DNA analyst found a mixed Y-STR profile, "with the major part matching an unknown male and the minor part 'matching' [the defendant's] DNA profile at five loci." *Id.* ¶ 45. The analyst testified at trial that the defendant "could not be excluded" as the contributor, and she "extensively explained the statistics regarding the number of people who would also match the profile." *Id.* ¶ 59.

¶21 On appeal, the defendant argued for the first time the trial court violated Rules 403 and 702 by admitting evidence of the mixed Y-STR profile. *Id.* ¶ 56. Our supreme court, however, found the Y-STR results were "helpful to the jury." *Id.* ¶ 58. It explained, "The results were related to a disputed issue—whether [the defendant] was the perpetrator—because the fact he could not be excluded tended to make it more likely that he sexually assaulted and killed [the victim] than if the Y-STR results had excluded him." *Id.* The court further observed, "Although the Y–STR results could be attributed to a statistically significant percentage of the general population, this circumstance does not diminish or eliminate the fact that [the defendant] was among that group." *Id.*

¶22 Here, by contrast, we are not dealing with a situation where Gomez's profile "match[ed]" the minor Y-DNA profile on the external genital swabs at five loci and Gomez "could not be excluded" as a contributor. *Id.* ¶¶ 45, 58. Rather, the analyst testified that, on the external

genital swabs, in addition to the "full profile" for R.R., she found a minor Y-DNA profile consisting of two "male DNA markers or . . . [a]lleles" that were not from R.R. She explained that the minor Y-DNA profile was "inconclusive for comparison purposes" because "[i]t's only at two markers" and "[t]here is not enough information." She emphatically stated, "We would not make a comparison. There is a reason we say it's inconclusive. We don't have information to make that comparison."[6] The analyst nevertheless testified, upon questioning from the prosecutor, that Gomez's profile had the same two alleles at the same two locations as the minor Y-DNA profile.

¶23 Other jurisdictions that have dealt with this issue have concluded that "inconclusive" DNA results are not relevant and, thus, not admissible. *See, e.g.*, *Commonwealth v. Cavitt*, 953 N.E.2d 216, 231 (Mass. 2011) ("In these circumstances, testimony regarding inconclusive DNA results is not relevant evidence because it does not have a tendency to prove any particular fact that would be material to an issue in the case."); *State v. Johnson*, 862 N.W.2d 757, 771 (Neb. 2015) ("[T]he relevance of DNA evidence depends on whether it tends to include or exclude an individual as the source of a biological sample."). For example, in *People v. Marks*, 374 P.3d 518, ¶ 11 (Colo. App. 2015), a DNA expert analyzed seven items of evidence collected from a crime scene, comparing the DNA profiles found on those samples with the profile of the defendant. Several of the results were "inconclusive." *Id.* ¶ 19. On appeal, the defendant challenged the admission of those inconclusive results. *Id.* ¶ 22. The court observed that the inconclusive results did not "tend[] to make it more or less probable that the defendant is connected to the crime." *Id.* ¶¶ 26-27. It pointed out that the expert had explained "an 'inconclusive' result meant that 'a person might be there as a possible contributor or [a person] might be excluded'" and "'the DNA does not support a conclusion either way.'" *Id.* ¶ 27 (alteration in *Marks*). The court therefore concluded the evidence did not meet the relevancy requirement of Rule 401, Colo. R. Evid., because the

[6]In *Escalante-Orozco*, the analyst testified that "'included' and 'not excluded' mean the same thing." 241 Ariz. 254, ¶ 49. But the analyst here used no such language. Although she initially explained, "[i]n some cases, we can say [an individual] cannot be excluded or a determination could not be made," she was careful to only use the latter language when discussing the minor Y-DNA profile and Gomez's profile. Based on the record before us, we therefore understand "could not be excluded" as used in *Escalante-Orozco* to be different from the "inconclusive" results here.

expert's "inconclusive findings provided no information to the jury." *Id.* ¶ 28.

¶24 However, as Gomez acknowledges, still other jurisdictions have suggested that "less-than-exact" DNA results may nonetheless be relevant and admissible if "accompanied by statistical data regarding the probability of a defendant's contribution to [the] sample."[7] *Deloney v. State*, 938 N.E.2d 724, 729-30 (Ind. Ct. App. 2010); *see also United States v. Davis*, 602 F. Supp. 2d 658, 679 (D. Md. 2009) ("The Court agrees with the numerous courts and authorities that have concluded that DNA evidence purporting to inculpate a defendant must be accompanied by some sort of explanation as to the significance of the consistency."). But the availability of statistical data seems to rest preliminarily on the ability to draw a comparison of the DNA samples. *See Deloney*, 938 N.E.2d at 729-30 (expert "could not calculate the statistical significance of any matches" because "there just was not enough information"); *Cavitt*, 953 N.E.2d at 232 (because no conclusions could be drawn from DNA evidence, it follows that statistical evidence to explain import of evidence would not come into play). In any event, our supreme court has suggested that statistical evidence is not always necessary in quantifying DNA results. *See Boles*, 188 Ariz. at 132 ("opinion based on personal experience" permissible); *see also Hummert*, 188 Ariz. at 124 (expert gave opinion based on "personal knowledge and study"). The analyst in this case gave no statistical data or personal opinion on the likelihood of the minor Y-DNA profile matching Gomez's profile, presumably because she lacked sufficient information for a comparison. *Cf. Escalante-Orozco*, 241 Ariz. 254, ¶¶ 45, 58-59 (when defendant's profile "match[ed]" Y-STR profile at five loci, analyst "extensively explained" statistics regarding DNA results).

¶25 Some jurisdictions have suggested that "inconclusive" DNA evidence is inadmissible on prejudice grounds under their equivalent to Rule 403. For example, in *People v. Coy*, the Michigan Court of Appeals

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[7] The state maintains that because Gomez failed to present his statistical-data argument below, it is forfeited, *see Escalante*, 245 Ariz. 135, ¶ 1, and that because he did not argue on appeal that the error was fundamental, it is waived, *see State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008). Although we agree the argument was not clearly raised below, we nonetheless address it because we must affirm the trial court's ruling if correct for any reason and the statistical-data case law informs our relevancy and unfair-prejudice analyses. *See State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012).

determined that "evidence of the potential match between [the] defendant's DNA and the mixed DNA samples obtained" from the crime scene had "minimal probative value," given that it lacked "accompanying interpretive statistical analysis evidence." 620 N.W.2d 888, 899 (Mich. Ct. App. 2000). The court further reasoned that, because there was no evidence on the likelihood of a match, a "significant possibility exists that the jury might have attributed the potential DNA match preemptive or undue weight, thus unfairly prejudicing defendant." *Id.* The court thus concluded that the admission of the evidence violated Rule 403, Mich. R. Evid., because the risks of confusing the jury and prejudicing the defendant substantially outweighed any minimal probative value of the evidence. *Id.*

¶26 While these cases are helpful, none of them is on all fours with the facts in this case. Here, the analyst testified about the "inconclusive" minor Y-DNA profile found on the external genital swabs and the two alleles, which were contained in that profile and were consistent with Gomez's profile. The trial court's initial ruling on Gomez's motion in limine seemed to suggest that the former was admissible but not the latter. At trial, however, the court admitted evidence of both.

¶27 We must first consider whether the analyst's testimony was relevant under Rule 401. The threshold for relevancy is low—the evidence must have "any tendency" to make a consequential fact more or less probable. *See State v. Leteve*, 237 Ariz. 516, ¶ 48 (2015). Courts may not "consider the weight or sufficiency of the evidence in determining relevancy and '[e]ven if a [trial] court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth.'" *Robinson v. Runyon*, 149 F.3d 507, 512 (6th Cir. 1998) (quoting *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1344 (6th Cir. 1992); *see also State v. Burns*, 237 Ariz. 1, ¶ 47 (2015) (lack of certainty regarding evidence goes to weight not admissibility).

¶28 While "inconclusive" DNA evidence may not lead the jury to "a conclusion or definite result," *Inconclusive*, Black's Law Dictionary (11th ed. 2019), we cannot say it has no tendency to make a fact more or less probable, *see* Ariz. R. Evid. 401. As the state suggests, evidence that the analyst found male DNA belonging to someone other than R.R. on the external genital swabs increased the probability that Gomez had committed the sexual assault, as alleged in the indictment. In addition, the presence of the same two alleles in both the minor Y-DNA profile and Gomez's profile tended to make it more probable that Gomez had assaulted J.B.

¶29 Moreover, we disagree with Gomez's suggestion that the analyst's testimony should have been precluded because it was not "helpful" under Rule 702. *See Daubert*, 509 U.S. at 591 (describing helpfulness as "another aspect of relevancy"). Gomez does not challenge the analyst's qualifications, testing methods, or results. Indeed, he recognizes that she used a "reliable" DNA testing method that "is widely accepted by forensic scientists and courts throughout this country." Gomez's argument is instead directed at the "helpfulness" of the evidence based on the "inconclusive" result and its tendency to nevertheless improperly identify Gomez as the perpetrator. However, as described above, the analyst's testimony bore on the question of Gomez's guilt—albeit circumstantially. *See id.* at 591-92 ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."). "It was the jury's prerogative to assess the weight of this evidence." *Forde*, 233 Ariz. 543, ¶ 64. Accordingly, we cannot say the trial court abused its discretion by concluding that the "inconclusive" minor Y-DNA profile was relevant. *See Duncan*, 216 Ariz. 260, ¶ 13.

¶30 We must next consider whether the probative value of the analyst's testimony was substantially outweighed by a danger of unfair prejudice or misleading the jury under Rule 403. The weighing and balancing under Rule 403 is generally a matter within the sound discretion of the trial court. *State v. Roberts*, 139 Ariz. 117, 123 (App. 1983). But reversal is nonetheless appropriate when there is a clear abuse of that discretion. *Id.*; *see also Gomez*, 211 Ariz. 111, ¶ 12. On this issue, we find it necessary to address the analyst's testimony separately—first, the presence of an "inconclusive" minor Y-DNA profile on the external genital swabs and second, the two alleles, which were contained in that profile and Gomez's profile.

¶31 First, the analyst's testimony concerning the presence of a minor Y-DNA profile on the external genital swabs was probative evidence showing that another male had touched J.B. We do not see how evidence of this "inconclusive" profile's existence caused any unfair prejudice to Gomez. *See State v. Schurz*, 176 Ariz. 46, 52 (1993) ("adversely probative" evidence that tends to implicate defendant not necessarily unfairly prejudicial). This evidence had no "undue tendency to suggest decision on an improper basis, . . . such as emotion, sympathy or horror." *Hardy*, 230 Ariz. 281, ¶ 40 (alteration in *Hardy*) (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993)). And because we are addressing the presence of the minor Y-DNA profile itself, which the analyst clearly explained was "inconclusive," rather than the specifics of the results, we disagree with Gomez that it had the

potential of misleading the jury. *See State v. Steinle in & for the Cty. of Maricopa*, 239 Ariz. 415, ¶ 15 (2016) (potential for misleading jury by admitting evidence "might be mitigated by testimony that explains the circumstances"). Accordingly, we cannot say the trial court clearly abused its discretion by concluding the probative value of that part of the DNA evidence was substantially outweighed by a danger of unfair prejudice or misleading the jury. *See* Ariz. R. Evid. 403; *see also Roberts*, 139 Ariz. at 123.

¶32 Second, as to the analyst's testimony concerning the two alleles found in the minor Y-DNA profile and Gomez's profile, we find *State v. Fulminante* instructive. 193 Ariz. 485 (1999). There, the defendant was convicted of first-degree murder. *Id.* ¶ 1. "Testing of swabs taken from the victim's oral, vaginal, and rectal cavities proved inconclusive of whether [she] had been sexually abused." *Id.* ¶ 6. At trial, the expert who tested the swabs testified that the "results were 'moderately positive' but inconclusive, likely due to decomposition of the body, thus rendering the expert's final conclusion negative." *Id.* ¶ 66. Our supreme court concluded that "any minimally probative value of this evidence was substantially outweighed by its prejudicial effect." *Id.* ¶ 67. It explained:

> The examination of the state's expert who conducted the test strongly suggested that the findings were not reliable enough to confirm there had been a sexual assault. If the state's expert was forthright enough to say that the findings were so inconclusive he had to reach a negative conclusion, then admitting the evidence so that the jury could reach a different conclusion merely invited the jury to speculate and posed a serious threat of misleading.

Id.

¶33 Here, testing of the external genital swabs established an "inconclusive" minor Y-DNA profile, yet the analyst stated that the two alleles from the minor profile were consistent with Gomez's profile in terms of their numbers and locations. Because the profile itself was "inconclusive," the probative value of the two alleles was minimal. Perhaps more importantly, the analyst could not provide any statistical data regarding the number of people who would have had those two alleles in their profile. The jury thus "d[id] not know whether the patterns [were] as common as pictures with two eyes, or as unique as the Mona Lisa." *United States v. Yee*, 134 F.R.D. 161, 181 (N.D. Ohio 1991). Evidence of the two

alleles plainly "invited the jury to speculate and posed a serious threat of misleading." *Id.*; *see Johnson*, 862 N.W.2d at 774 ("[W]ithout knowing the statistical significance of DNA testing results, any conclusion that a juror draws from such evidence will likely be pure speculation."); *cf. Escalante-Orozco*, 241 Ariz. 254, ¶ 59 (jury could understand limited probative value of DNA evidence without danger of confusion when expert "extensively explained" results and corresponding statistics). It also "suggest[ed] decision on an improper basis"—that because the two alleles were consistent, the "inconclusive" minor Y-DNA profile must have belonged to Gomez. *See Hardy*, 230 Ariz. 281, ¶ 40.

¶34 As the dissent points out, the trial court is afforded considerable discretion under Rule 403. *Supra* ¶ 51. While "we will not second-guess" that court, *State v. Rodriguez*, 186 Ariz. 240, 250 (1996), we must nonetheless fulfill our function, reviewing its discretionary decisions, s*ee Gomez*, 211 Ariz. 111, ¶ 12. And we conclude the minimal probative value of the evidence concerning the matching two alleles was substantially outweighed by a danger of unfair prejudice and confusion. *See* Ariz. R. Evid. 403; *see also Roberts*, 139 Ariz. at 123. The trial court therefore erred by admitting it. *Cf. State v. Bocharski*, 200 Ariz. 50, ¶¶ 26-27 (2001) (trial court abused discretion under Rule 403 in admitting photographs that had "little tendency to establish any disputed issue" and must have been "introduced primarily to inflame the jury").

Harmless Error

¶35 Having concluded that error occurred, we must next consider whether the error requires reversal. When a defendant objects to an alleged error below, we review for harmless error.[8] *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). Under this standard, the state bears the burden of establishing "beyond a reasonable doubt that the error did not contribute to or affect the verdict." *Id.* Put another way, "the question 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *State v. Romero*, 240 Ariz. 503, ¶ 7 (App. 2016) (quoting *Leteve*, 237 Ariz. 516, ¶ 25). In undertaking this analysis, we do not "become in effect a second jury to determine whether a

[8]The state contends that several aspects of Gomez's argument are subject only to fundamental-error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). However, because we find error based on Rule 403, which was raised below, we review for harmless error.

defendant is guilty." *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)).

¶36 Gomez argues that the admission of evidence regarding the two alleles in the "inconclusive" minor Y-DNA profile and his profile was not harmless because the "evidence of guilt was not overwhelming and the testimony was directly material to the defense of his case." The state counters that "[t]he inconclusive DNA evidence and the appearance of the two minor alleles in Gomez's profile was not the only evidence that corroborated J.B.'s testimony, and any error in their admission was harmless."

¶37 As a preliminary matter, we recognize that generally "[a]n 'inconclusive test is evidence of nothing' and 'evidence of nothing [is] not prejudicial[].'" *Marks*, 374 P.3d 518, ¶ 37 (first alteration added, remaining alterations in *Marks*) (quoting *Clark v. State*, 96 A.3d 901, 907 (Md. Ct. Spec. App. 2014)). This suggests that the erroneous admission of evidence of the "inconclusive" minor Y-DNA profile found on the external genital swabs was harmless because it "did not contribute to or affect the verdict." *Henderson*, 210 Ariz. 561, ¶ 18. However, the evidence at issue here is not the presence of the "inconclusive" profile, which we determined was properly admitted, *see supra* ¶¶ 29, 31, but the presence of the same two alleles in that profile and Gomez's profile. We therefore focus on this particular evidence but nonetheless consider it in light of the record as a whole. *See State v. Bible*, 175 Ariz. 549, 588 (1993); *see also Romero*, 240 Ariz. 503, ¶ 8 (listing factors to consider as part of harmless-error analysis). In addition, we are mindful that the harmless-error determination "must be made on a case-by-case basis." *State v. Sanchez-Equihua*, 235 Ariz. 54, ¶ 26 (App. 2014).

¶38 Here, the analyst's testimony that Gomez's profile contained the same two alleles as the minor Y-DNA profile found on the external genital swabs went to the primary issue in the case. Despite disagreeing on the consensual nature of their contact, J.B.'s and Gomez's accounts were largely consistent as to where Gomez had touched and kissed J.B. The part at which their accounts diverged and the ultimate question of fact presented to the jury was whether Gomez had "plac[ed] his finger(s) in [J.B.'s] vagina." At trial, J.B. testified Gomez had done so, while Gomez denied it. Thus, as Gomez points out, this was essentially a "he said, she said" case. As such, any evidence that enhanced or diminished the credibility of J.B. or Gomez was critical. *See State v. Bustamante*, 229 Ariz. 256, ¶ 5 (App. 2012) ("The credibility of witnesses and the weight given to their testimony are issues for the jury."). And evidence that the minor Y-DNA profile had two

alleles in common with Gomez's profile did just that—it supported J.B.'s version of events and, therefore, credibility. *Cf. State v. Lehr*, 201 Ariz. 509, ¶¶ 31-43 (2002) (preclusion of defendant's evidence criticizing DNA testing not harmless when evidence was "critical"); *State v. Lee*, 191 Ariz. 542, ¶ 19 (1998) (when testimony "might well have weighed heavily in the jury's evaluation," error in admitting drug-courier evidence not harmless); *State v. Plew*, 155 Ariz. 44, 50 (1987) (when effects of cocaine intoxication addressed "key issue and, in fact, the only really controverted issue," its preclusion not harmless).

¶39 As a practical matter, even though the analyst clearly indicated that the minor Y-DNA profile was "inconclusive," her testimony that the profile contained two alleles, which were also found in Gomez's profile, was powerful evidence suggesting a potential contributor: Gomez. Contrary to the state's assertion otherwise, "DNA evidence remains powerful inculpatory evidence." *McDaniel v. Brown*, 558 U.S. 120, 132 (2010); *see Bible*, 175 Ariz. at 578 ("Because 'science' is often accepted in our society as synonymous with truth, there is a substantial risk of overweighting by the jury." (quoting Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 102, at 212 (3d ed. 1991))); *see also State v. Roscoe*, 145 Ariz. 212, 219 (1984) (DNA evidence has "aura of special reliability and trustworthiness" (quoting *Chapman v. State*, 638 P.2d 1280, 1290 (Wyo. 1982))).

¶40 The effect was compounded by how the prosecutor used this evidence. *See Romero*, 240 Ariz. 503, ¶ 20. As Gomez points out, the analyst's "testimony matching these two alleles to [his] profile became the required link in the State's arguments that the 'DNA helped corroborate J.B.'" During her closing argument, the prosecutor focused on the "two outliers" in the minor Y-DNA profile, and, despite recognizing that the profile was "inconclusive for comparison purposes," she reiterated that J.B. could "tell us who the other male was"—Gomez. The prosecutor added, "The DNA evidence helps corroborate the things that [J.B.] said happened to her from the very beginning, not months later." She continued:

> Two males on [J.B.'s] external genitals. The other person that she tells you touched her there is this defendant. And while the DNA evidence may not be able to show you that because it's inconclusive, that's what [J.B.] tells you. And it's absolutely consistent with everything else that she has said.

¶41 The overarching theme of the prosecutor's closing and rebuttal argument was therefore that the DNA evidence and J.B.'s stories were consistent. Although there was other DNA evidence that corroborated J.B.'s account—specifically, the DNA matches to Gomez found on the face, neck, chest, and breast swabs—that evidence was not at issue in this case. Because the only question of fact before the jury involved vaginal penetration, the jury reasonably could have interpreted the prosecutor's statements as suggesting the evidence of the common alleles supported J.B.'s story and, therefore, her credibility. And like the prosecutor, our dissenting colleague seems to rely on J.B.'s testimony, used in conjunction with evidence of the two matching alleles, to support the inference that Gomez was the contributor to the minor Y-DNA profile found on the external genital swabs—an inference the trial court, at least initially, sought to avoid. *Supra* ¶ 58.

¶42 Moreover, the challenged evidence regarding the two alleles was not merely cumulative to other admissible evidence. *See Romero*, 240 Ariz. 503, ¶ 17. And despite the trial court suggesting that it might provide a curative instruction, none was given. *See id.* ¶ 19.

¶43 Lastly, we disagree with the state's assertion that it had "presented overwhelming proof of Gomez's guilt." *See id.* ¶ 9. The standard for overwhelming evidence is considerably more stringent than the test for sufficient evidence. *State v. Anthony*, 218 Ariz. 439, ¶ 41 (2008); *see Sanchez-Equihua*, 235 Ariz. 54, ¶ 28. As mentioned above, this was essentially a "he said, she said" case that rested on the jury's determination of credibility.[9] *Cf. State v. Carlos*, 199 Ariz. 273, ¶ 26 (App. 2001) (error not harmless when trial court precluded testimony that may have affected credibility determinations). Without any other witnesses or direct evidence tending to establish who was telling the truth, the state has not demonstrated that the verdict was "surely unattributable" to the erroneous admission of this evidence. *Romero*, 240 Ariz. 503, ¶ 7; *see also Bible*, 175 Ariz. at 589.

¶44 In conclusion, applying the "stringent concepts" of harmless-error review, *Bible*, 175 Ariz. at 588, we are unable to conclude

[9]We in no way mean to suggest that J.B. was not credible. Our analysis focuses on the state's suggestion that the challenged DNA evidence "corroborates" her testimony. *Cf. State v. Munoz*, 114 Ariz. 466, 469 (App. 1976) (conviction may be based on uncorroborated testimony of victim).

beyond a reasonable doubt that the improperly admitted evidence regarding the two alleles shared by the "inconclusive" minor Y-DNA profile and Gomez's profile did not contribute to or affect the verdict, *see Henderson*, 210 Ariz. 561, ¶ 18. As such, we must reverse Gomez's conviction and remand for a new trial.[10] *See State v. Coghill*, 216 Ariz. 578, ¶ 33 (App. 2007).

Disposition

¶45 For the reasons stated above, we reverse Gomez's conviction and remand for a new trial.

B R E A R C L I F F E, Judge, dissenting:

¶46 This dispute involves first, the admissibility of DNA test results showing DNA of an unknown man, other than the victim's boyfriend, to be present in an external swab of the victim's genitals. And second, the admissibility of evidence showing a partial match between that same DNA evidence and Gomez's DNA profile. The majority correctly concludes that the presence of two men's DNA on the victim's genitals meets the threshold of Rule 401, Ariz. R. Evid., of making a fact of consequence to the action—specifically whether a sexual assault occurred at all—more or less probable than it would be without the evidence. It errs, however, in concluding that the relevance of the partial match to Gomez was inadmissible in light of Rule 403, Ariz. R. Evid. I respectfully dissent as to the majority's Rule 403 evaluation and the consequent reversal and remand.

The DNA Evidence

¶47 As explained by the state's DNA expert witness, Cristina Rentas, the exterior genital swab taken from the victim revealed a "full profile" for the victim's boyfriend and a "minor" profile with "two additional male DNA markers or types. Alleles." Those two alleles, or markers, were deemed to be from a minor Y-DNA profile—that is, from a "contributor" other than the victim's boyfriend because those markers did

[10]We do not address Gomez's final argument that the detective's "affirmative response to the question 'Do you in talking with [J.B.]—were you able to determine if sexual assault occurred?' constitute[s] fundamental error." Because the issue was based on what appears to be a poorly worded question, it is not likely to recur on retrial. *See State v. Coghill*, 216 Ariz. 578, ¶ 34 (App. 2007).

not match markers in the boyfriend's profile. They did, however, match two markers in Gomez's DNA profile. Nonetheless, although the two markers matched two markers in Gomez's DNA profile, overall the test result was, according to Rentas, "inconclusive" for identification purposes. It was inconclusive because, given the limited sample size, Rentas could not say whether there would be any additional matches to Gomez's DNA markers. As Gomez characterized Rentas's expected testimony in pre-trial motion argument, she could not, given the insufficiency of the sample, "run statistics" for the purpose of narrowing the DNA sample down to a (relatively) positive identification of a suspect. And, as Rentas explained in her trial testimony, "[i]f you're seeing a minor DNA profile at two markers, you can't be sure what the rest of that minor DNA profile is. It could match anyone. You don't know. There is not enough information. So that is why we say it's inconclusive. We can't compare to it." Thus she "cannot say that this DNA is . . . Gomez's."

¶48 Rentas's certainty and her scientific conclusion that the minor Y-DNA profile did not match the victim's boyfriend's profile, and thus was from a different male contributor, was unchallenged. Irrespective of who the actual donor was, by that evidence alone we know that, as the victim testified, a man other than her boyfriend was in a position to leave DNA on the exterior of her genitalia. This unchallenged evidence, if credited by the jury, made it more probable than not that a man other than the victim's boyfriend, as she testified, put his hand down her pants. This evidence then, as the majority correctly concludes, had a "tendency to make" the fact of sexual assault "more . . . probable than it would be without the evidence." Ariz. R. Evid. 401(a). And, of course, whether a sexual assault occurred was a "fact . . . of consequence in determining the action." Ariz. R. Evid. 401(b).

¶49 But further, there was also no scientific dispute raised at trial that the two markers in the minor Y-DNA profile in fact matched two markers in Gomez's DNA profile. While, as Rentas testified, we cannot know how many or whether any more markers would match Gomez's; these two did match his even while they did not match the victim's boyfriend's. Consequently, the universe of possible DNA contributors in the exterior genitalia sample was narrowed from a universe of possible contributors being every man and woman on earth, to just men, then to any man who was not her boyfriend, and then to any man who had two markers in the same place as Gomez's markers. While this may have been insufficient to a reasonable degree of scientific probability to allow an expert to opine that this DNA was left by Gomez, it nonetheless made it "more . . . probable" that Gomez touched the victim's exterior genitalia as the victim testified "than it would be without the evidence." Ariz. R.

Evid. 401(a). At a minimum it made it *less* probable that a man with two DNA markers matching neither the boyfriend's nor Gomez's DNA profile was the contributor. And, of course, given that the victim testified only her boyfriend and Gomez touched her genitals, if neither of the two profiles had any markers in common with Gomez, that certainly would also have been a "fact . . . of consequence in determining the action." Ariz. R. Evid. 401(b). Even if statistical evidence had shown that a significant number of other men had markers also matching the minor Y-DNA profile it "does not diminish or eliminate the fact that [Gomez] was among that group." *See Escalante-Orozco*, 241 Ariz. 254, ¶ 58. As a result, the fact of the match of the two minor Y-DNA markers was relevant under Rule 401, even while otherwise being scientifically inconclusive for identification purposes. What the jury could or should do with that information was simply a matter of weight. *See Burns*, 237 Ariz. 1, ¶ 47 (inconclusive scientific evidence goes to weight, not admissibility).

¶50 The question presented here, then, rather than the fundamental relevance of the partial match, is whether the relevant fact of the match between two of Gomez's markers and the two markers identified in the minor Y-DNA sample presented a risk of jury confusion or prejudice, and then whether that risk substantially outweighed the relevance. Just as Rentas's repeated testimony about the inconclusive nature of the evidence for identification purposes was enough to allay the majority's fear of confusion or prejudice about the DNA matching a second male contributor generally, it was sufficient to allay concern about the two-marker match to Gomez.

¶51 Under Rule 403, Ariz. R. Evid., relevant evidence, although generally admissible, may be excluded if its probative value is "substantially outweighed" by the risk of, among other things, prejudice or confusion of the issues. A trial court's rulings on the admission of evidence generally is reviewed for abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56 (1990). We similarly evaluate a trial court's determination of admissibility in light of Rule 403 for an abuse of discretion. *State v. Cañez*, 202 Ariz. 133, ¶ 61 (2002) ("Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion."). "The balancing of factors under Rule 403 'is peculiarly a function of trial courts, not appellate courts.'" *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 53 (App. 2004) (quoting *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 26 (App. 2000)). Consequently, a trial court's discretion in the admission of evidence in light of a Rule 403 challenge is considerable. *State v. Cooperman*, 232 Ariz. 347, ¶ 17 (2013). We ought to be loath to find prejudice when the trial court, much closer to the question, found none.

¶52 Here, after defense objection under Rule 403 to the admission of the results of the minor Y-DNA profile evidence, the trial court admitted the evidence. It did so after determining that, in light of the expected testimony being that the DNA test results as to the minor Y-DNA profile were inconclusive, there was no risk of confusion under Rule 403 that could not be ameliorated by cross-examination. Further, the court expressly barred the state from raising any inference that the testing positively identified the minor Y-DNA evidence as Gomez's DNA,[11] and the state did not do so.

¶53 The majority here generally affirms the admission of the minor Y-DNA profile evidence from the exterior surface of the victim's genitals to the extent that it shows that a male, not the victim's boyfriend, left DNA residue on the exterior of her genitals. It did so notwithstanding that the testifying DNA expert concluded that the evidence was scientifically "inconclusive" for identification purposes. Indeed, it is *because* the expert had so testified that the majority concludes that the minor Y-DNA evidence showing presence of another man's DNA generally was not substantially outweighed by the risk of prejudice or confusion. That consideration should have led the majority to reach the same conclusion as to the match of the two minor Y-DNA profile markers.

¶54 The majority's inference of a risk of jury confusion is speculation. The majority essentially concludes that the jury could have misinterpreted the "inconclusive" minor Y-DNA sample as a positive identification of Gomez as the man, other than her boyfriend, who left DNA on her genitals. While such a misinterpretation is *possible*, to reach it the jury would have had to ignore the candid admissions of the prosecutor, the argument of defense counsel, the clear testimony of the DNA expert witness, and the court's instructions. Given these hurdles, the risk of such a misinterpretation did not outweigh, let alone substantially outweigh, the relevance of confirmed male DNA which, in part, matched Gomez, but did

[11]Although the trial court admitted the evidence because it felt the jury would have questions, that is, might be "confused," if it were *not* admitted—as opposed to admitting it for its inherent relevance—this is immaterial. *See State v. Moreno*, 236 Ariz. 347, ¶ 5 (App. 2014) ("We will uphold the court's ruling if legally correct for any reason supported by the record.").

not match her boyfriend, and was where, in essence, the victim said it would be.

¶55 On more than one occasion, Rentas testified—in direct examination and on cross—that she could not render a conclusion as to the identity of the donor of the two minor alleles in the genital swab. In her closing argument, the prosecutor said the DNA evidence for the genital swab was "inconclusive for comparison purposes" and that it "may not be able to show" who touched the victim's genitals. The defense attorney in her closing argument emphasized the lack of DNA evidence from the victim's vagina telling the jury that the only thing it had to consider was "where is the DNA?" and that the "science does not lie." And, the trial court, in giving its instructions, told the jury to "[d]etermine the facts only from the evidence produced in court. When I say evidence, I mean the testimony of witnesses and the exhibits introduced in court. You should not guess about any fact."

¶56 Because the expert testimony was what it was, because the trial court had precluded the state from arguing that the minor Y-DNA sample was Gomez's, and because counsel had every opportunity to persuade the jury as to the proper weight to be afforded the evidence, the court found no basis under Rule 403 to preclude the evidence. In the end, if the jurors reached the conclusion that the two matching markers in the minor Y-DNA profile *conclusively* showed the DNA to have been Gomez's—and there is no evidence they did—they did not reach that conclusion from the evidence presented or the arguments of counsel characterizing it. They would have had to reach that conclusion by guessing, and thereby defy the instruction given to them by the court. We ought not assume that they did so. *State v. Prince*, 226 Ariz. 516, ¶ 80 (2011) ("Jurors are presumed to follow jury instructions."). There is no reason that the court should have anticipated such an unlikely conclusion. Consequently, the court correctly concluded that Gomez failed to show that the evidence should have been precluded under Rule 403.

The State's Argument Was Not Misleading

¶57 In dispensing with the state's harmless error argument, the majority insinuates that the prosecutor made an impermissible argument about the impact of the minor Y-DNA profile evidence. Such an insinuation is unfounded and unfair. The majority faults the prosecutor for having an "overarching theme" "that the DNA evidence and [the victim's] stories were consistent." And it assails such a theme as if it were not so. The DNA evidence, from Gomez's DNA on the victim's face, neck, and chest, to the

fact that a male, not her boyfriend, left DNA evidence on the exterior of her genitalia, absolutely *was* consistent with the victim's testimony. While the DNA analysis did not conclusively prove to a scientific certainty that Gomez put his hand down the victim's pants as she claimed, the fact that another man's DNA was found there was wholly consistent with her testimony. The prosecutor would have been derelict in failing to remind the jury of this.

¶58 It was certainly true—as the prosecutor plainly said in the very same closing argument the majority faults—that the two markers in the minor Y-DNA profile from the exterior of the victim's genitalia was "inconclusive for comparison purposes" and this could not scientifically narrow all possible contributors down to Gomez. But it was also certainly true, as the prosecutor argued, that the jury did not *need* conclusive DNA evidence to conclude who, other than her boyfriend, could have been the other DNA contributor: the victim told them who it was. All the jurors needed to do was to weigh the victim's testimony against Gomez's on this point, which is all the prosecutor asked them to do.

¶59 The majority's belief in a risk of jury confusion or prejudice was too speculative to justify second-guessing the trial court's determination that there was no such insurmountable risk under Rule 403 and then to gainsay the jury's determination of guilt. I would affirm the court's rulings and the conviction and sentence in full.